United Nations **AT**

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 969

Case No. 1027: RAJAN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, Vice-President, presiding; Mr. Chittharanjan Felix Amerasinghe; Ms. Marsha A. Echols;

Whereas at the request of Srinivasan Souri Rajan, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), the President of the Tribunal, with the agreement of the Respondent, extended to 31 July 1998 the time-limit for the filing of an application with the Tribunal;

Whereas, on 9 July 1998, the Applicant filed an application containing pleas which read as follows:

"II. *Pleas*

...

I was selected for the post of Operations Officer at the classified NO-C level, appointed at [the] NO-B level but denied placement at the graded level of the post for unjustifiable reasons.

...

... I therefore appeal to the ... Tribunal to take appropriate corrective action in the matter.

d) *Compensation*:

Details of compensation are given below:

i)	If my placement to NO-C level had been effective from 1 January 1992 together with interest up to date of settlement.	US$ 8,500 1,000 (or the actual)
ii)	Compensation for damages to my reputation, humiliation, and mental torture, arising out of my supervisor's prejudice and the conspiracy organized by a group of Bhopal staff.	US$ 40,000
iii)	Compensation for the difference in monthly pension and lump sum amount payable to me if my appointment to NO-C by level was effective 1 January 1992; or else, my pension benefit be recast. The total financial loss will have an adverse bearing on the pensionary benefits to my spouse as well, later.	US$ 5,000 (or as determined by the Administrative Tribunal)
iv)	Administrative costs (for stationary, photocopying secretarial help, transmission charges, etc.).	US$ 500
v)	When I was selected, according to a fax message received by ICO [India Country Office] from New York, for a six-month short-term assignment to Baghdad in September 1992, under Emergency Commission, I was neither informed of this nor released by ICO. I was thus deprived of this rare opportunity which involved additional financial benefits to me.	US$ 20,000

e) *Any other relief*:

The period of over 3 years that the JAB (Joint Appeals Board) took for review of my case and submitting its recommendation to the Secretary-General and the constitution of two investigation ad hoc panels in 1996 and 1997, at the behest of JAB, had only contributed to abnormal delay and unnecessary publicity to my case with concomitant adverse effect on my reputation and continuous strain on my retired life. I would request the Tribunal to consider these aspects and order adequate relief measures."

Whereas the Respondent filed his answer on 28 February 2000;

Whereas the Applicant filed written observations on 22 June 2000;

Whereas, on 12 July 2000, the Tribunal put questions to the Respondent, to which he provided answers on 21 July 2000;

Whereas, on 2 August 2000, the Applicant submitted comments on the Respondent's submission of 21 July 2000;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 1 February 1973, in the UNICEF Office, New Delhi, India, on a three-month, fixed-term appointment with the functional title of Secretary/Stenographer. His appointment was extended several times and, effective 1 November 1977, converted to a permanent appointment. On 23 July 1989, he resigned his General Service position and, effective 24 July 1989, he received a two-year fixed-term Project Personnel appointment in the capacity of Assistant Finance Officer, at the NO-A level.

On 10 May 1991, the Applicant applied for the NO-C level post of Operations Officer, Bhopal, India. On 3 June 1991, the Applicant was informed by a Personnel Officer, India Country Office (ICO), New Delhi, that he had been appointed to the post of Operations Officer, Bhopal, India. He was also notified, however, that he was required to complete "a minimum-time-in-grade" of one year at the NO-B level before he could actually be placed at the budgeted (NO-C) level of the post.

On 14 October 1992, the Officer-in-Charge, Personnel Services, ICO, sent a memorandum to the Chief, Field Office, Bhopal, noting that the Applicant's required one year at the NO-B level was due to end on 31 December 1992 and requesting the Chief to submit his recommendation as to the Applicant's placement at the graded level of the post, as well as a performance evaluation report (PER) covering the period 1 January 1992 to 31 December 1992.

On 16 November 1992, the Chief, Field Office, Bhopal, informed the Applicant of various deficiencies in his performance. He gave the Applicant six months to improve his performance at which time another assessment would be made. The Applicant sent a memorandum to the Chief, Field Office, Bhopal, on 11 December 1992, requesting reconsideration of his decision.

On 3 March 1993, the Applicant's PER covering the period 1 January 1992 to 31 December 1992 was completed. He received five ratings of "3" (good) and one of "2" (passable) in a range of 1 to 5, with 5 being the highest.

On 7 April 1993, the Applicant wrote a memorandum to the Chief, Field Office, Bhopal, requesting the latter to send his recommendation for review by the Appointment and Promotion Committee (APC) for his placement to the graded level of the post. The Applicant copied the memorandum to an Ombudsperson for the Bhopal Field Office, requesting the latter to "resolve [his] grievance".

On 13 April 1993, the Chief, Personnel Services, ICO, once again requested the Chief, Field Office, Bhopal, to provide his recommendation on whether the Applicant should be considered for promotion. The following day, the Chief, Personnel Services, ICO, asked the Applicant to confirm whether, by copying the memorandum to the Ombudsperson, he had initiated a formal grievance process. The Applicant applied in the affirmative on 4 May 1993.

On 5 May 1993, the Chief, Field Office, Bhopal, wrote to the Applicant, noting that his performance had still not improved, despite several reminders. He requested the Applicant to provide him with a reason "why [he] should recommend [his] case to the graded level" and to submit a list of his "special accomplishments", after which the Chief, Field Office, Bhopal, would forward his recommendation to the Personnel Section, ICO.

On 7 May 1993, the Applicant notified the Ombudsperson that he was withdrawing his complaint. On 10 May 1993, the Applicant wrote a memorandum to the Chief, Field Office, Bhopal, stating that he had withdrawn his grievance appeal with the Ombudsperson.

On the same day, the Chief, Field Office, Bhopal, sent a memorandum to the Chief, Personnel Services, ICO, informing him that the Applicant had promised to improve his performance, and that, in view of his retirement in May 1994, and to "provide him with pensionary benefits" he recommended the Applicant's promotion to the NO-C grade level, effective 16 April 1993. In his reply of 14 May 1993, the Chief, Personnel Services, ICO, noted that the only relevant consideration for promotion was ability to perform at the higher level and not retirement or pension considerations. He accordingly requested a clear recommendation regarding the

Applicant's suitability for promotion to the graded level of the post. On 25 May 1993, the Chief, Field Office, Bhopal, again recommended that the Applicant be promoted.

On 6 July 1993, the Officer-in-Charge, Personnel Services, ICO, informed the Applicant that, having reviewed his case, the APC had concluded that his performance did not justify promotion to the NO-C level and that the UNICEF Representative had agreed with its conclusion.

On 18 March 1994, the Chief, Personnel Services, ICO, requested the State Representative, Bhopal Field Office, to forward his recommendation on whether or not the Applicant should be considered for promotion to the graded level of his post. On 23 March 1994, the State Representative, Bhopal Field Office, responded that, since he was not convinced of the Applicant's suitability, he was not in favour of recommending his promotion.

On 28 April 1994, the Applicant sent a memorandum to the Chief, Personnel Services, ICO, requesting that his case be considered by an independent committee.

The Chief, Personnel Services, ICO, informed the Applicant on 3 May, 1994 that the APC had once more declined to recommend his promotion and that the ICO Representative had agreed with that recommendation. By memorandum dated 18 May 1994 to the Chief, Personnel Services, ICO, the Applicant requested a review of the decision not to promote him.

The Applicant retired on 31 May 1994.

On 1 September 1994, the Applicant was informed by a Deputy Executive Director that the decision in his case stood. On 12 September 1994, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

On 4 April 1996, a special *ad-hoc* panel set up at the request of the JAB to investigate the Applicant's allegations of prejudice reported that they had failed to find any conclusive evidence of prejudice. However since the first panel had been constituted without the Applicant's knowledge or participation, a second panel was constituted which submitted its report on 27 March 1997, also concluding that there was no prejudice against the Applicant. Subsequently, on 22 September 1997, the JAB submitted its report. Its considerations, conclusions and recommendations read, in part, as follows:

"***Considerations***

...

46. ..., the Panel examined the material before it. It noted an inordinate amount of correspondence concerning difficulties in working relations between the Appellant and his supervisor as well as between him and his colleagues in the Bhopal Office. It was concerned by the Appellant's allegations and considered [them] to be of such importance for its review of the case that it requested a formal investigation. The Panel considered its request to be part of its authority under staff rule 111.2 (1), which allows it to seek information concerning the issue before it.

...

49. The report of the investigation panel was submitted to the Panel by the Representative of the Secretary-General. This Panel found it to be sound and felt that the conclusion of the report could highlight the issues in question. The conclusion of the investigation panel reads as follows:

> 'Based on the facts that emerged from the investigation, the [investigation] panel was of the unanimous view that there was no prejudice against the Appellant.
>
> ...'

50. ... In this context, it found that the Appellant had been considered for placement at the NO-C level, but was not promoted to the above level because his supervisor had not recommended him for promotion and because the ratings contained in his 1992 PER were not good enough to justify promotion. The Panel judged the conclusion of the investigation panel on the above issues had been self-explanatory and clarified the situation beyond reasonable doubt.

Conclusions and Recommendations

51. In view of the above, the Panel concluded that the decision not to promote the Appellant to the NO-C level did not violate his rights including his right for due process.

52. Therefore, the Panel makes *no recommendation* in support of the appeal."

On 17 February 1998, the Under-Secretary General for Management transmitted a copy of the JAB report to the Applicant and informed him, in part, as follows:

"...

The Secretary-General has taken note of the Panel's conclusion that the decision not to promote you to the NO-C level did not violate your rights including your right to due process and that the Panel made no recommendation in support of your appeal. The Secretary-General has decided to accept the Panel's conclusion and recommendation and to take no further action in respect of your case.

..."

On 9 July 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision to grant him appointment to the post of Operations Officer in 1991 at the NO-B level instead of the NO-C level was arbitrary and was caused by the rules and regulations "being twisting and interpreted to suit the convenience of the Management". Seven other staff members appointed to this position at the same time as him were appointed to the NO-C level. It was unfair for him to have been paid at the lower NO-B level while these seven others were doing similar work as him but yet drew salary at the NO-C level.

2. He should never have been compelled to complete one year at the NO-B level, secure the recommendation of his supervisor nor seek a further APC review of his case, as a precondition to his promotion to the NO-C level since the APC that had found him suitable for the position in 1991 had not stipulated any of these conditions.

3. His supervisor was biased toward him and treated him in a callus and humiliating manner. This "negative role" played by his supervisor in turn resulted in the denial of his placement at the NO-C level " with the accompanying financial benefits".

Whereas the Respondent's principal contentions are:

1. The Applicant was properly promoted to the NO-B level.

2. The Applicant has no right to promotion but only a right to consideration for promotion. The Applicant was properly considered for promotion, and his rights were not violated by his "non-promotion" to the NO-C level.

3. The decision not to promote the Applicant to the NO-C level was not the result of prejudice against him.

The Tribunal, having deliberated from 6 July to 4 August 2000, now pronounces the following judgement:

I. The Applicant requests "appropriate corrective action" and damages regarding the delay in his promotion to a higher grade and regarding certain procedural deficiencies in the process. The Tribunal finds that the Respondent followed the appropriate procedures and that, in spite of differences between the Applicant and himself, acted in a non-discriminatory manner toward the Applicant.

II. Along with seven other candidates, the Applicant was selected in 1991 for the post of Operations Officer at the NO-C level, although he occupied a post classified at level NO-A. However, in accordance with the relevant rules, the Applicant was required to complete an interim one year time-in-grade at the NO-B level, after which there would be a review by the APC before his definitive placement at the higher level. The Applicant complains about this one-year delay and about the failure to pay him at the NO-C level during this period.

III. The delay was required under the UNICEF Human Resources Manual. Chapter 4, paragraph 4.4.40 reads:

> "Promotion may only be effected to the next higher level. In the event of a staff member being appointed to a post, which is classified at two levels higher than his/her personal grade, promotion may only be affected to the next higher level. Upon completion of the minimum time in grade, the staff member is eligible to be reviewed by the APC for promotion to the level of the post."

Similar language is found in staff rule 104.14 (iii) (b).

IV. This reference to paragraph 4.4.40 is challenged by the Applicant, who argues that his new level was not a promotion but a direct appointment, which occurred during a recruitment campaign that altered the normal promotion procedures. According to the Applicant, these special circumstances led to appointments, rather than promotions, for internal and external applicants and obviated the need for a time in grade at the NO-B level. He refers to his previous change from the GS-6 to the NO-A level. While the situation described by the Applicant raises questions about the consistency of the Respondent's application of its rules, it cannot justify a variation from the express UNICEF Guidelines or the UN Staff Rules. It follows that the Applicant was placed and paid at the appropriate level.

V. The Applicant claims that paragraph 4.4.40 of the UNICEF Human Resources Manual was selectively followed. However, the Respondent answers that to the "best of [his] knowledge, this policy has always been applied and we are unaware of any instances where this has not been the case." This statement is not categorical and conflicts with that of the Applicant. The Tribunal has been presented with no legal basis for an internal selection process other than a promotion, which is governed by paragraph 4.4.40.

VI. The Applicant argues that the procedure followed was discriminatory, because external candidates were appointed directly to the NO-C level as were seven other internal candidates. He presents no support for those statements or for his conclusion that the backgrounds of the other internal candidates were comparable. On the other hand, the Respondent has stated that the "other seven staff members who were appointed to the posts of Operations Officer were already encumbering NO-B posts and serving at that level (ranging from 7 months to 5 years). They applied for posts, which were only one level higher than that of the posts they were occupying." There is no evidence to the contrary.

VII. The Tribunal next turns to the matter of the delays in the proceedings of the JAB and the Agency's internal appeals process, which continued for approximately three years. The delay was in part the result of the investigations by *ad hoc* panels of the Applicant's claims of prejudice. The

report of the first panel, created without the knowledge of the Applicant and completed without participation by the Applicant, was not forwarded to the JAB as a result of questions raised by the Applicant. A second panel was created and convened. Its report was forwarded to the JAB, which did not have the benefit of the Applicant's reaction to the report of the *ad hoc* panel but did consider all the Applicant's claims during its proceedings.

The resort to *ad hoc* panels delayed the internal review process. However, the Tribunal finds that the use of these panels showed the Agency's desire to explore the allegations of wrongdoing and prejudice, rather than a desire to delay. The procedures followed and the consequent delay were designed to promote the administration of justice. This was not a case of inaction by the Agency. (Cf. Judgement No. 892, *Sitnikova* (1998)). Rather, the resulting increase in the time required for the internal review process was justifiable and was, in some sense, a response to the concerns raised by the Applicant. The decision to convene an *ad hoc* panel, to re-constitute it in response to objections raised by the Applicant and to conduct a thorough investigation were reasons for the justifiable delay. (Cf. Judgement No. 897, *Jhuthi* (1998)). Although the three-year period was a lengthy one and contributed to the uncertainty of the situation, the Tribunal finds that it was reasonable under the circumstances.

VIII. Regarding the Applicant's assertions of prejudice, the Tribunal notes that the *ad hoc* panel and JAB reviewed the situation at the Bhopal Field Office. Obviously, there were anomalies and differences among personnel. However, the Tribunal is persuaded by the assessments of the panel and the JAB in this matter, both of which gathered information and heard witnesses. The JAB concluded that there was no prejudice against the Applicant. Their conclusion was not unreasonable based on the record before us (including the many submissions by the Applicant), although the Tribunal notes that the JAB also made recommendations for improvements at Bhopal, such as staff training. The Applicant has the burden of proving prejudice and must do so with convincing evidence, e.g., of substantive or procedural defects or improper motive. (Cf. Judgement No. 928, *Abdulhadi et al.*, (1999)). He has not met that burden in this case.

IX. For the foregoing reasons, the Tribunal rejects all claims of the Applicant.

(Signatures)

Mayer GABAY
Vice-President, presiding

Chittharanjan Felix AMERASINGHE
Member

Marsha A. ECHOLS
Member

Geneva, 4 August 2000

Maritza STRUYVENBERG
Executive Secretary